(3)

No. 93-1145

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

JOHN E. FILIOS, *et al.*,
Petitioners,

v.

COMMISSIONER OF REVENUE OF MASSACHUSETTS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts

BRIEF *AMICUS CURIAE* ON BEHALF OF THE MILITARY COALITION IN SUPPORT OF PETITIONERS

EUGENE O. DUFFY*
GREGORY W. LYONS
O'NEIL, CANNON & HOLLMAN, S.C.
111 E. Wisconsin Avenue
Suite 1400
Milwaukee, WI 53202
(414) 276-5000
Attorneys for Amicus Curiae

* Counsel of Record

February 11, 1994

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Does the Commonwealth of Massachusetts' policy of requiring federal military retirees to pay state income tax on their military retirement benefits while it completely exempts from state tax the retirement benefits of state and municipal retirees violate 4 U.S.C. § 111 which prohibits states from taxing federal employees in a discriminatory fashion?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICUS CURIAE*	1
REASONS FOR GRANTING THE WRIT	2
CONCLUSION	10
APPENDIX A	1a
APPENDIX B	8a
APPENDIX C	11a
APPENDIX D	13a
APPENDIX E	17a
APPENDIX F	21a

TABLE OF AUTHORITIES

CASES Page

Barker v. Kansas, —— U.S. ——, 112 S. Ct. 1619 (1992) ..... *passim*
Davis v. Michigan Dep't of Treasury, 489 U.S. 803 (1989) ..... *passim*
Filios v. Commissioner of Revenue, 415 Mass. 806, 615 N.E.2d 933 (1993) 4, 6
Green v. Mansour, 474 U.S. 64 (1985) 8
Harper v. Virginia Dep't of Taxation, —— U.S. ——, 113 S. Ct. 2510 (1993) 8
Kerr v. Waddell, No. 1 CA-TX 92-0010, *appeal pending* (Az. Ct. App.) 9
Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue and Fin., —— U.S. ——, 112 S. Ct. 2365 (1992) 9
Phillips Chem. Co. v. Dumas Indep. Sch. Dist., 361 U.S. 376 (1960) ..... *passim*
Sheehy v. Montana Dep't of Revenue, 864 P.2d 762 (Mont. 1993) 8
United States v. City of Spokane, 918 F.2d 84 (9th Cir. 1990), *cert. denied*, —— U.S. ——, 111 S. Ct. 2888 (1991) 8

STATUTES

4 U.S.C. § 111 ..... *passim*
28 U.S.C. § 1341 8
G.L.c. 62 ..... 5, 6

OTHER AUTHORITIES

Instructions—1993 Massachusetts Resident Income Tax 5
Letter Ruling 1985-12 6
Letter Ruling 1987-8 ..... 5, 6
Technical Information Release 1989-10 6
Technical Information Release 1992-3 6
U.S. Const., Art. I, § 8, Cls. 12, 13 and 14 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1145

JOHN E. FILIOS, *et al.*,

Petitioners,

v.

COMMISSIONER OF REVENUE OF MASSACHUSETTS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts

---

BRIEF AMICUS CURIAE ON BEHALF OF THE MILITARY COALITION IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

Pursuant to Rule 37.2 of this Court, The Military Coalition (herein "TMC") respectfully submits this brief as *amicus curiae*.[1] TMC is a voluntary association of 24 military-related organizations which was formed six years ago. App. A, 1a. Collectively its constituent organizations represent the interests of over 1,900,000 members, who are retired, reserve and active members of the Uniformed Services of the United States. TMC is dedicated

---

[1] *Amicus* has received the written consents of the parties to the filing of this brief; those consents have been filed with the Clerk of the Court.

to the purpose of providing a cohesive means for the study and advocacy of issues which impact upon the maintenance of a strong national defense and the preservation of rights and benefits its varied constituents have earned through years of dedicated service to the United States.

Despite this Court's unequivocal mandates in *Barker v. Kansas*, —— U.S. ——, 112 S. Ct. 1619 (1992), *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989), and *Phillips Chem. Co. v. Dumas Indep. Sch. Dist.*, 361 US. 376 (1960), the Commonwealth of Massachusetts continues to refuse to give effect to this Court's decisions as the controlling statement of federal law. The resolution of the question presented in this case—whether a state court may engraft an exception to the rule of nondiscrimination under the constitutional doctrine of intergovernmental tax immunity, as codified in 4 U.S.C. § 111, for retired military members—is vitally important to *amicus*. If the decision below is permitted to stand, military retirees and, indeed, military members on active duty throughout the fifty states will be at risk that rights established by Congress may be arbitrarily abridged by any state solely on the basis of local political considerations. *Amicus* has supported the enactment of several measures by Congress which prohibit discrimination of the type upheld by the decision below. Thus, *amicus* has a unique perspective on the question presented by this case as well as a vital interest in its proper resolution.

REASONS FOR GRANTING THE WRIT

The decision of the Supreme Judicial Court of Massachusetts presents a question of far-reaching importance: whether a state court may engraft an exception to the rule of nondiscrimination under the constitutional doctrine of intergovernmental tax immunity, as codified in 4 U.S.C. § 111, for retired members of the armed forces? The decision of the court below that it was at liberty to create an

exception where Congress has declined to do so conflicts with the decisions of this Court and the will of Congress. Such a result, if permitted to stand, threatens grave harm to substantial federal interests. As this Court has recognized, matters implicating the national defense are exclusively the province of Congress.

Amicus respectfully submits that this Court should grant the petition in this case to correct the erroneous result of the court below on an issue involving the important concern of national defense. *See* U.S. Const., Art. I, § 8, Cls. 12, 13 and 14.

If there should be any doubt as to the need for certiorari, *amicus* requests that the Court seek the views of the Solicitor General of the United States because of the important federal interests implicated in the decision below.

1. The decision of the Supreme Judicial Court of Massachusetts conflicts with the holdings of the Court in *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989) and *Phillips Chem. Co. v. Dumas Indep. Sch. Dist.*, 361 U.S. 376 (1960). If permitted to stand, the result in this case will be an invitation to the states to eviscerate the holdings of these decisions and render the doctrine of intergovernmental tax immunity meaningless.

In *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989), this Court construed the "plain language" of 4 U.S.C. § 111 and concluded that the "statute leaves no room for doubt" that federal retirement benefits "are subject to § 111." *Id.* at 808. In resolving the question of the validity of the Michigan Income Tax Act, this Court held that "the relevant inquiry is whether the inconsistent tax treatment is *directly related to*, and *justified* by, 'significant differences between the two classes.'" *Id.* at 816 (emphasis added) (citation omitted). However, in resolving the issue of whether Massachusetts may discriminate in favor of its own retirees and against military retirees,

the court below ignored the *Davis* test. *See Filios v. Commissioner of Revenue*, 415 Mass. 806, 810, 615 N.E.2d 933 (1993).

Neither the lower court's opinion nor the position of the State demonstrates how the differential treatment of military retirees is "based on" the alleged differences between the two classes. *See Phillips Chemical Co. v. Dumas Indep. Sch. Dist.*, 361 U.S. 376, 384 (1960); *Davis*, 489 U.S. at 816-17. The only distinguishing factor set forth in Massachusetts' exemption provisions is the source of the compensation. There is no evidence of any kind which establishes that the Massachusetts legislature intended to single out military retired pay for discrimination because of any actual or perceived differences from other forms of retirement income. The court below based its decision *solely* on the *post hoc* rationalization of the respondent. However, such a rationalization is legally insufficient to permit a state to discriminate against military retired pay.

The court below held that Massachusetts' discriminatory scheme was justified because of the noncontributory nature of the military retirement system.[2] The court below adopted the position of the respondent that the discriminatory tax treatment of retirement benefits was "depend[ent] on the pension plan" and that members of the favored state class have already "been taxed on the contributions." *Filios*, 415 Mass. at 810. This conclusion is untenable.

Contrary to the conclusion of the court below and the position of the respondent in this case, Massachusetts law, independent of the provisions of this discriminatory scheme, provides protections to prevent the imposition of tax upon retirement benefits attributable to employee con-

---

[2] As the Solicitor General poignantly noted in *Barker*, Congress' decision to fund military retired pay out of general revenues rather than annual contributions "is no concern of state tax policy . . . ." *See* Brief For The United States As Amicus Curiae In Support Of Petitioners, at 23 n.34, *Barker v. Kansas*, No. 91-611 (1992).

tributions that have been taxed at the time of contribution. Certainly the respondent knows this. For example, the instructions to the 1993 Massachusetts Resident Income Tax Form 1, at 8, clearly state that pensioners are to "[s]ubtract from [their taxable] income the amount of [their] contributions which were previously taxed by Massachusetts until the total of [their] taxed contributions are received." App. F, 21a. Thus, in the first instance, it is clear that the proffered rationale for the source based discrimination at issue in this case does not exist in fact.

In addition, the court's conclusion that the members of the favored state class "have already been taxed on [their] contributions" is tenuous at best. Under the discriminatory scheme in issue, some members of the favored state and local class of retirees were never taxed at all at the time their contributions were made and are not subject to tax on any of their retirement benefits. *See, e.g.*, Letter Ruling 1987-8, App. D, 14a-15a.

Similarly, many of the remaining members of the favored state and local class have likewise never been subject to tax on either their contributions or their retirement benefits. Massachusetts provides a deduction for tax purposes of $2,000 for *employee* contributions to contributory pension plans. *See* G.L.c. 62, § 3(B)(a)(4).[3] The balance of the favored state and local class has similarly paid little or no tax on their contributions to the plan by virtue of this same provision. *Id.*

---

[3] The statute provides in relevant part:

> (a) There shall be deducted from the Part B adjusted gross income in determining the Part B taxable income:
>
> * * * *
>
> (4) All sums *deducted* from wages as *contributions* to any annuity, pension, endowment or retirement fund of the United States government, the commonwealth or any political subdivision thereof, provided, that the deduction for such contributions and the deductions otherwise allowable under subparagraph (3) hereof attributable to any one taxpayer shall not in the aggregate exceed two thousand dollars . . . .

Moreover, if there were any doubt as to the source based discrimination of Massachusetts' scheme, it is readily demonstrated by the scheme's operative effect as to retirees of states other than Massachusetts. Retirees of other states' public employee retirement systems are entitled to the discriminatory exemption, not based on whether their contributions were previously taxed by either Massachusetts or their former state, but *solely* on the source of the payor state. If the payor state exempts Massachusetts' public employee retirement income from taxation, then the payor state's public employee retirement income is exempt in Massachusetts. *See* Technical Information Release 1989-10, App. C, 11a-12a. On the other hand, if the other state does not exempt Massachusetts public employee retirement income, then the other state's public employee retirement income is taxed in Massachusetts, irrespective of whether there has been prior taxation of the *employee* contributions. *See* Letter Ruling 1985-12, App. B, 8a.

Finally, the rationale of the court below is foreclosed in all events by *Davis*. Massachusetts retirement benefits are funded not only through *employee* contributions, but also through government *employer* contributions and pension fund investments. *See, e.g.*, Pet. at 12-13. Yet, Massachusetts does not tax, at *any* time, these *employer* contributions and pension fund investments. However, the court below justified the State's taxation on the *full* measure of military retired pay on the basis that *part* of the benefits received by state and local employees—the sum attributable to *employee* contributions—had been previously taxed. *Filios*, 415 Mass. at 810.[4] *See also* Technical Information Release 1992-3, App. E, 20a.

---

[4] Of course, as demonstrated above, the conclusion that *employee* contributions have been *fully* taxed in the first instance is not true. *See, e.g.*, Letter Ruling 1987-8, *supra*; G.L.c. 62, § 3(B)(a)(4), *supra*, n.3.

Examining Massachusetts' scheme, it is clear that the "State's articulated rationale is not in fact the basis for the disparate treatment, but only a cloak for discrimination against federally funded benefits." *Barker v. Kansas*, —— U.S. ——, 112 S. Ct. 1619, 1626 (1992) (citation omitted). As this Court recognized in *Davis*, a "tax exemption truly intended to account for differences in [the taxation for the funding of] retirement benefits would not discriminate on the basis of the source of those benefits, as [Massachusetts'] statute does; rather it would discriminate on the basis of the amount of benefits received by individual retirees [which were previously taxed]." *Davis*, 489 U.S. at 817. Accordingly, for purposes of 4 U.S.C. § 111, it is obvious that Massachusetts' proffered rationale fails "because an evenhanded application of the rationale would have resulted in inclusion of [virtually all state retirees] in the disfavored class." *Id.*

Under the doctrine of intergovernmental tax immunity, "the State [must] treat those who deal with the Government as well as it treats those with whom it deals itself." *Phillips Chemical Co. v. Dumas Indep. Sch. Dist.*, 361 U.S. 376, 385 (1960). Consistent with this doctrine, 4 U.S.C. § 111 prohibits the discriminatory state taxation of "salaries, retirement benefits, and other forms of compensation . . . on account of the source of the compensation." *Davis*, 489 U.S. at 810. Nothing in the doctrine of intergovernmental tax immunity or the statute differentiates between military retirees and other retired employees. *Barker v. Kansas*, —— U.S. ——, 112 S. Ct. 1619 (1992).

As this Court recognized in *Davis*, "[t]he danger that a State is engaging in impermissible discrimination against the Federal Government is greatest when the State acts to benefit itself and those in privity with it." *Davis*, 489 U.S. at 815 n.4. In the instant case, the court below acted impermissibly when it failed to scrutinize the respondent's *post hoc* rationalization for the discrimination.

Because of the Eleventh Amendment and the Tax Injunction Act, 28 U.S.C. § 1341, taxpayers, such as the petitioners, are relegated exclusively to state courts to press their claims for relief. But it is state courts that have demonstrated the greatest difficulty in recognizing this Court's decisions as the "controlling statement of federal law." *Harper v. Virginia Dep't of Taxation*, —— U.S. ——, 113 S. Ct. 2510, 2515 (1993). This Court is the only federal court that can hear the retirees' claims. Review by this Court is thus necessary to assure a correct and evenhanded application of this Court's decisions. Absent review by this Court, "[t]he State too easily avoids its responsibilities . . . [for its] noncompliance with federal law." *Green v. Mansour*, 474 U.S. 64, 81 (1985) (Blackmun, J., dissenting).[5]

2. Review by this Court is also necessary to resolve the conflict among the state courts of last resort regarding what is sufficient to satisfy the "significant differences" standard of *Davis*, 489 U.S. at 816, and *Phillips*, 361 U.S. at 383-385. Contrary to the decision below, the Supreme Court of Montana has recently held that in order to satisfy the requirements of *Davis*, the State must demonstrate that the disparate treatment is directly related to, and justified by, significant differences between the two classes. *See Sheehy v. Montana Dep't of Revenue*, 864 P.2d 762 (Mont. 1993) (*Sheehy II*). The Montana Supreme Court recognized that the State's "desire" to maintain an advantage for its own retirees is inadequate under *Davis*. In invalidating Montana's legislative response to *Davis*, the court recognized that discriminatory schemes cannot

---

[5] In stark contrast to the decision below, in those rare circumstances where federal courts have been able to exercise jurisdiction, there has been no difficulty in providing taxpayer relief for unconstitutional state taxes which violate the doctrine of intergovernmental tax immunity. *See, e.g., United States v. City of Spokane*, 918 F.2d 84 (9th Cir. 1990), *cert. denied*, —— U.S. ——, 111 S. Ct. 2888 (1991).

evade the requirements of federal law by merely "denominat[ing] [them] otherwise."

Thus, absent review by this Court, the requirements of the doctrine of intergovernmental tax immunity will continue to be subject to differing standards in different states. In Montana, *post hoc* rationalizations are insufficient to demonstrate that inconsistent tax treatment is directly related to and justified by significant differences between the two classes. In Massachusetts, it appears that any articulated rationale, even where it is not the basis for the disparate treatment, is sufficient to justify discriminatory taxation of those who deal with the federal government.[6] Review by this Court is necessary to assure that there is but one standard for determining whether inconsistent tax treatment is justified.

[6] *See also Kerr v. Waddell*, No. 1 CA-TX 92-0010, *appeal pending* (Az. Ct. App.). In *Kerr*, the Arizona Tax Court held that Arizona's tax scheme, which discriminates in favor of *current* state employees and against *current* federal employees, was valid in part based on the State's illusory assertion that the State's adoption of the federal definition of adjusted gross income created significant differences for purposes of state taxation between the two classes. However, as this Court has recognized in an analogous context, "[t]he adoption of the federal system in whole or in part, however, cannot shield a state tax statute from . . . scrutiny." *Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue and Fin.*, —— U.S. ——, 112 S. Ct. 2365, 2372 (1992).

CONCLUSION

Contrary to the decisions of this Court in *Phillips* and *Davis*, the court below utilized a "cloak for discrimination," *Barker*, 112 S. Ct. at 1626, to justify a result which violates the express will of Congress. *Amicus* respectfully urges that the petition for a writ of certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts should be granted and that the decision below should be reversed.

Respectfully submitted,

EUGENE O. DUFFY *
GREGORY W. LYONS
O'NEIL, CANNON & HOLLMAN, S.C.
111 E. Wisconsin Avenue
Suite 1400
Milwaukee, WI 53202
(414) 276-5000

* Counsel of Record

Attorneys for Amicus Curiae

February 11, 1994